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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/741,328	12/19/2003	Robert Neumann	NEU-108	4494

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EXAMINER
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GELLNER, JEFFREY L

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 03/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

2

# Office Action Summary

Application No. 10/741,328		Applicant(s) NEUMANN, ROBERT	
Examiner Jeffrey L. Gellner		Art Unit 3643	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 09 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) 3 and 5-9 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4 and 10-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election of Species II (contacting includes spraying) in the reply filed on 9 February 2005 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). Claims 3 and 5-9 are withdrawn from examination because they are drawn to non-elected species.

### ***Priority***

The priority date for the instant application is considered to be 30 May 2001 as to the method of contacting crop seeds and grains prior to planting the crop seeds and grains. This date is considered proper because a review of 6,523,298 did not disclose the use of crop seeds and grains prior to planting the crop seeds and grains.

Additionally, the records of the PTO do not show 09/747,225 as a parent application of 60/294,374.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Art Unit: 3643

Claims 10-13 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims are improper and therefore indefinite because they add limitations to an independent claim (claim 1) which uses the transitional “consisting of.” A claim which depends from a claim which “consists of” the recited elements or steps cannot add an element or step (see MPEP 2111.03).

### *Claim Rejections - 35 USC §103*

The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4, and 10-15 are rejected under 35 U.S.C. §103(a) as being unpatentable over Stroll (Natural crop protection in the Tropics) in view Talbot et al. (US 5,139,561).

As to claims 1 and 15, Stroll discloses a method for protecting crop plants from destruction by insect, fungus, bacteria and other living organisms (first two paragraphs of “Methods of Use” section on page 2 of the printout) consisting of contacting the plant with an aqueous formulation containing only water and capsicum ((first 2 paragraphs of “Methods of Use” section on page 2 of the printout). Not disclosed is applying the composition to crop seeds or grains prior to planting the crop. Talbot et al., however, teaches that a protective composition can be applied to plants or seeds(col. 2, lines 52-56; col. 4, example 7). It would have been

Art Unit: 3643

obvious to one of ordinary skill in the art at the time of the invention to modify the method of Stroll by applying to pre-plant seeds as disclosed by Talbot et al. so as to control pests at an early stage so as to promote healthy plant growth.

As to claim 2, Stroll as modified by Talbot et al. further disclose coating the seeds (encompassed in "seed dressing" of col. 2 lines 52-56 of Talbot et al.).

As to claim 4, Stroll as modified by Talbot et al. further disclose spraying (first two paragraphs of "Methods of Use" section on page 2 of the printout).

As to claims 10-13, the limitations of Claim 1 are disclosed as described above. Not disclosed are method steps of drying the seeds in a chamber with a conveyor belt. Examiner takes official notice that it is old and notoriously well known in the agronomic art to dry the seeds in a chamber with a conveyor belt after a seed treatment. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the method of Stroll as modified by Talbot et al. by drying the seeds in a chamber with a conveyor belt after the treatment as a efficient method of coating seed.

As to claim <sup>14</sup>~~15~~, Stroll as modified by Talbot et al. further disclose contacting during emergence (from Stroll in that plants can be foliarly treated at any time).

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Babbini, Neumann ('572), Neumann ('298 B2), and Neumann ('436 A1) disclose in the art various methods with capsicum. Neumann discloses in the instant application's pre-grant publication.

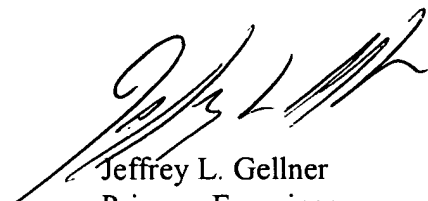
Art Unit: 3643

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Jeffrey L. Gellner whose phone number is 703.305.0053 (after 4 April 2005 use: 571.272.6887). The Examiner can normally be reached Monday through Thursday from 8:30 am to 4:00 pm. The Examiner can also be reached on alternate Fridays.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Peter Poon, can be reached at 703.308.2574. The official fax telephone number for the Technology Center where this application or proceeding is assigned is 703.872.9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703.308.1113.



Jeffrey L. Gellner  
Primary Examiner